FILE COPY

IN THE

Supreme Court of the United States

OCTOBER, A. D., 1948

No. 340

PIETRO CINGRIGRANI, et al.,
Petitioners,

vs.

B. H. HUBBERT & SON, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT AND BRIEF IN SUPPORT OF PETITION

I. DUKE AVNET,
EDGAR PAUL BOYKO,
Attorneys for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Pietro Cingrigrani, Philipo Corso, Joseph Dairs, John Dick, Jr., John J. Geary, Theodore R. Kifer, Towest Kimball, Henry Michael, John Scordo, Delbert Shryock, Howard Shryock, Rudolph Speciale and Harry A. Wise, Jr., respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Fourth Judicial Circuit. The said petitioners were substituted as plaintiffs, by an order of the United States District Court for the District of Maryland, dated September 10, 1947, for Albert Atallah, et al., original

plaintiffs. While the caption of the original complaint was used in this case and in the United States Court of Appeals for the Fourth Circuit, it is believed that for the sake of correct identification and in order to have the proper parties appear before this Honorable Court, the caption of the amended complaint (filed September 10, 1947) should hereafter be used.

STATEMENT OF THE MATTER INVOLVED

This case presents serious questions relating to the constitutional rights of the petitioners, particularly arising under the Fifth Amendment to the United States Constitution and also to issues arising under Article I, Section 1, Article I, Section 10, Article II, Section 1, and Article III, Section 1 of the United States Constitution. More specifically the question presented is whether the Congress of the United States has the power, constitutionally, to deprive the petitioners, retroactively, of substantive rights and remedies accruing to them under the provision of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1060, 29 U. S. C. A. 201 et seq. Thus it raises directly the question of the Constitutional validity of the Portal-to-Portal Act of 1947, so-called, 61 Stat. 84, 29 U. S. C. A. 251, et seq.

Petitioners filed a suit in the United States District Court for the District of Maryland, against their employer, B. H. Hubbert & Son, Inc., respondent herein, to recover overtime pay and liquidated damages under the Fair Labor Standards Act, cited above. This action was commenced, originally, in a representative capacity, but by leave of Court an amended complaint was filed, substituting the petitioners as individual plaintiffs. The defendant thereupon filed a motion to dismiss the amended complaint

upon the ground that it had become outlawed by the provisions of the Portal-to-Portal Act of 1947, cited above. This statute had been enacted during the pendency of the suit here involved. Upon this motion, the District Court, on November 25, 1947, made a final order dismissing the amended complaint and added the following statement:

> "See opinion in similar case of Seese vs. Bethlehem (Steel) Co. in this Court."

Timely notice of appeal was given by the plaintiffs. The appeal was heard before the United States Court of Appeals for the Fourth Circuit, which Court, in an opinion set forth fully in the brief accompanying this petition, affirmed the order of the District Court.

Both the District Court and the Court of Appeals relied on their prior decision in the case of *Seese vs. Bethlehem Steel Co.* (decided by the United States Court of Appeals for the Fourth Circuit on May 5, 1948, and reported in 163 F. 2nd 58), wherein the constitutionality of the Portal-to-Portal Act of 1947 was upheld and, pursuant to that Act, it was further held that the courts had no jurisdiction to entertain petitioners' suit.

THIS COURT HAS JURISDICTION

This Court has jurisdiction under Chapter 81, Section 1254, of the new Judicial Code (U. S. Code, Title 28, Judiciary and Judicial Procedure), and under Rules 12 and 38 of the Revised Rules of the Supreme Court of the United States.

THE QUESTIONS PRESENTED

1. Does the Portal-to-Portal Act of 1947 represent an attempt by Congress to exercise judicial power in violation of Article III of the Constitution of the United States and

does it, therefore, deprive the petitioners of their property without due process of law in contravention of the Fifth Amendment?

2. Does the retroactive application of the Portal-to-Portal Act of 1947 deprive the petitioners of their property without due process of law in violation of the Fifth Amendment?

3. Are the provisions of the Portal-to-Portal Act of 1947, which purport to take away the jurisdiction of the courts, an invalid attempt to cloak the taking of petitioners' property rights without due process of law contrary to the Fifth Amendment?

4. Did Congress in enacting the Portal-to-Portal Act of 1947 reasonably exercise its powers under the commerce clause, or did it exceed those powers in view of the non-existence of the serious economic crisis purported to be the basis and justification of this legislation?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

This case involves "an important question of Federal law which has not been but should be settled by this Court." (Supreme Court Rule 38, par. 5(b)). Moreover, as will be shown in the appended brief, the United States Court of Appeals "has decided a federal question in this case in a way probably in conflict with applicable decisions of this Court" *(Id.)*.

The national importance of the Fair Labor Standards Act need hardly be argued. It was enacted "to extend federal control in the field of working conditions throughout the farthest reaches of the channels of interstate commerce." *Overstreet* v. *North Shore Corp.* (1943), 63 S. Ct.

494, 318 U. S. 125, 87 L. Ed. 656. Nor can it be denied that the Portal-to-Portal Act of 1947 purports to legislate with respect to broad questions of national importance, involving hundreds of thousands of the gainfully employed in every state of the union. (See: Congressional findings and declaration of policy, Portal-to-Portal Act of 1947, c. 52, par. 1, 29 U. S. C. A. 251).

The question of the validity *vel non* of the provisions of the Portal-to-Portal Act of 1947 must, of necessity, have a far-reaching influence upon the status and rights of wage earners throughout the land. If the constitutional objections herein urged are valid, then a serious inroad has been made into constitutionally safeguarded rights of the petitioners, as well as of thousands of other employees in interstate commerce throughout the nation, by the legislative branch of the Government. Judicial review, therefore, is of the utmost importance, and, indeed, will be the only means whereby redress can be secured. If, on the other hand, the lower courts were correct in their conclusions, it would be highly salutary to have this issue settled, once and for all, by the highest tribunal of the land. There have been conflicting decisions in the United States District Courts which may, before long, become reflected in the decisions of the United States Court of Appeals. In order to insure a settled state of this law, to quiet litigation, and to protect economic rights of a large number of United States citizens, it is respectfully submitted that an early ruling by this Honorable Court upon the questions here presented is of the utmost importance.

Never before has such a badly confiscatory statute been passed, taking potential property from one specific class and giving it to another. Never before has naked political power thus been used for the sake of special interests.

Petitioners do not believe that Congress has the power, under the Constitution, to do so. If petitioners are correct in their assumption, it is vitally important to the future welfare of this country that this Court so hold.

Respectfully submitted,

I. DUKE AVNET,
EDGAR PAUL BOYKO,
Attorneys for Petitioners.

IN THE

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OCTOBER, A. D., 1948

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland in the case of Seese vs. Bethlehem Steel Co. is reported in 74 F. Supp. 412. The opinion of the United States Court of Appeals for the Fourth Circuit in this case, reported in 168 F. 2d 993, is set forth fully below:

"Before PARKER and DOBIE, Circuit Judges, and WATKINS, District Judge.

I. Duke Avnet and Edgar Paul Boyko on brief for Appellants, and John H. Hessey and John H. Herold on brief for Appellee.

PER CURIAM:

This is an appeal challenging the constitutionality of the Portal to Portal Act of May 14, 1947. Counsel

for appellants admit that it presents the precise point which was decided by this Court adversely to their contention in *Seese* v. *Bethlehem Steel Co.* (May 5, 1948) 168 F. 2d 58. Counsel for appellants here were heard as amici curiae in that appeal; and the arguments they now advance were fully considered when that case was before us. There is nothing in their present argument which calls for a reconsideration of what we have so recently decided; and we do not feel that anything need be added to what we had to say in our opinion in the *Seese case*. The judgment below will accordingly be affirmed on the authority of that decision.

Affirmed."

JURISDICTION

The jurisdiction of this Court is invoked under Chapter 81, Section 1254 of the new Judicial Code (U. S. Code Title 28, Judiciary and Judicial Procedure). The United States Court of Appeals has in this case "decided an important question of federal law which has not been but should be, settled by this Court" (S. Ct. Rule 38, par. 5(d)). Moreover, it "has decided a federal question or questions in a way probably in conflict with applicable decisions of this Court" *(Id.)*. Judgment was entered in this case by the United States Court of Appeals for the Fourth Circuit on July 7, 1948.

STATEMENT OF THE CASE

This case was commenced by a suit in the United States District Court for the District of Maryland, by a number of employees (petitioners herein) against their employer, B. H. Hubbert & Son, Inc. (respondent herein), to recover overtime pay and liquidated damages under the Fair Labor Standards Act, as amended. The action was commenced originally, in a representative capacity, but by leave of

Court an amended complaint was filed, substituting the petitioners as individual plaintiffs. The defendant thereupon filed a motion to dismiss the amended complaint upon the grounds that it had become outlawed by the provisions of the Portal to Portal Act of 1947, *(Supra)*. This statute had been enacted during the pendency of this suit. Upon this motion, the District Court, on November 25, 1947, made a final order dismissing the amended complaint on the grounds stated in a prior decision in the case of *Seese* v. *Bethlehem Steel Co., (Supra)*.

From this decision the plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the order of the United States District Court in a *per curiam* opinion, set forth fully above.

ERRORS RELIED UPON

The United States Court of Appeals for the Fourth Circuit erred in sustaining the decision of the United States District Court, dismissing the complaint on the grounds of lack of jurisdiction and sustaining the Constitutionality of the Portal to Portal Act of 1947, on the basis of which jurisdiction had been denied. The United States Court of Appeals for the Fourth Circuit further erred, in incorporating its former decision in the case of *Seese* v *Bethlehem Steel Co. (Supra)* in holding that: (1) Congress in enacting the Portal to Portal Act of 1947 was exercising legislative and not judicial power; that the enactment merely repealed the original Fair Labor Standards Act as interpreted by this Court and did not in any manner affect adjudications already made, or attempt to direct the courts in the exercise of judicial power; (2) In enacting this law, Congress did not violate the Fifth Amendment to the Constitution, but was merely engaged in a reasonable exercise of its commerce powers by validating,

retroactively, contracts invalid under the Fair Labor Standards Act; that the exercise of this power was reasonable in view of a serious economic crisis found by Congress to be threatened as a consequence of Portal to Portal suits; (3) Since the substantive provisions of the Portal to Portal Act are valid, there can be no question as to the validity of the section denying jurisdiction to entertain the claim; that "whether the denial of jurisdiction would be valid if the provision striking down the claim were invalid is a question which does not arise."

ARGUMENT

I.

THE PORTAL-TO-PORTAL ACT OF 1947 REPRESENTS AN ATTEMPT BY CONGRESS TO EXERCISE JUDICIAL POWER IN VIOLATION OF ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES; IT THUS DEPRIVES THE PLAINTIFFS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW IN CONTRAVENTION OF THE FIFTH AMENDMENT.

The doctrine of the separation of governmental powers is embodied in the innermost structure of the Constitution, and finds its expression in these terms:

> "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives." (United States Constitution, Article I, Sec. 1.)
>
> "The executive power shall be vested in a President of the United States of America." (United States Constitution, Article II, Sec. 1.)
>
> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." (United States Constitution, Article III, Sec. 1.)

The fundamental importance of this constitutional trichotomy was fully recognized, in early times, by the highest court of the land:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. *It is also essential to the successful working of this system, that the persons entrusted with power in any one of those branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and to no other.*" *Kilbourn v. Thompson*, 13 Otto 168, 26 L. ed. 377. (Italics supplied.)

This Court has given more than lip service to this fundamental doctrine. It has affirmatively recognized its solemn duty to enforce the separation of powers promulgated by those who wrote our Constitution. Thus, recognizing its own limitations, it has acknowledged the impropriety of judicial exercise of legislative functions and has refused to upset or invalidate acts of Congress even where its members disagreed sharply with the wisdom of the legislation under consideration. It has declined to substitute its own judgment for that of an administrator serving under the President, for that would be to arrogate unto itself the authority reserved to the executive department alone.

And, at the same time, it has unhesitatingly struck down attempts on the part of the legislature to invade the judicial domain, to exercise power specifically forbidden to it by our basic law. *Kilbourn v. Thompson, (Supra); Ogden v. Blackledge*, 2 Cranch, 272, 2 L. ed. 276; *Reynolds v. McArthur*, 2 Peters 417, 7 L. ed. 470; *United States v. Klein*, 13

Wall. 128, 20 L. ed. 519; *Baltimore & Ohio R. R. Co. v. United States*, 298 U. S. 349, 80 L. ed. 1209.

And for the same reason those provisions of the Portal-to-Portal Act of 1947 which purport to destroy the present cause of action must likewise be struck down. In changing those provisions, Congress has unquestionably yielded to "those powerful and growing temptations * * * to overstep the just boundaries of (its) own department and enter upon the domain of the others." *Kilbourn v. Thompson, (Supra).*

In order to determine whether an Act of Congress represents an exercise of legitimate legislative power or whether in fact it invades the realm of judicial authority, it is necessary first to inquire into the natures of these powers. What is the judicial power which Congress is forbidden to exercise, which is reserved exclusively to the Courts? What is the essence of the legislative power which is within the exclusive province of Congress under the Constitution? How have the "lines which separate and divide these departments" been "broadly and clearly defined?"

In *Marbury v. Madison,* 1 Cranch. 137, Justice Marshall answered:

> "It is emphatically the province and duty of the judicial department to say what the law is."

And in *Webster v. Cooper,* 55 U. S. 488, 14 L. ed. 510, the judicial power was thus described:

> "The exposition of both (statute and Constitution) belongs to the judicial department of the government, and its decision is final, and binding upon all other departments of that government, and upon the people themselves, until they see fit to change their Constitution. * * *"

And Justice Holmes, in two opinions characterized by his unusual incisiveness, epitomized the basic distinction be

tween the judicial and the legislative power. First, in upholding a statute against an attack that it represented a legislative invasion of the judicial domain, he said:

> "The statute did not deal with the past or purport to grant or refuse a new trial in a case or cases then pending, but performed the proper legislative function of laying down a rule for the future in a matter as to which it had authority to lay down rules." *James v. Appel*, 192 U. S. 129, 48 L. ed. 377.

Then, in *Prentis v. Atlantic Coastline Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, he stated his conclusion in the following terms:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. This is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power."

Applying these principles to the legislation in question it becomes obvious that the statute cannot stand if, by its terms, it seeks to lay down a rule of conduct in existing factual situations, rather than a standard for future application.

Whatever might be said of the portions of the Portal-to-Portal Act which prescribe rules for the future, its provisions for retroactive operations—the provisions with which we are concerned here — fall clearly under the head of "judicial action" as thus defined. These provisions "declare liabilities * * * on present or past facts"; they say "what the law is"—and what the law was as to liability long before they were in effect; they determine the sum payable to plaintiffs by defendant under the employment relationship in existence prior to their adoption. These provisions oper-

ate in precisely the sphere in which the courts can take—and have taken—action.

And, fortunately, Congress did not leave its object to speculation. It stated its design and purpose in the opening paragraph of the statute itself. The history of this legislation shows that employers had for some years after the adoption of the Fair Labor Standards Act of 1938 sought to exclude a portion of the time worked by employees from the scope of compensable working time under the terms of that Act. The Administrator of the Wages and Hours Division and the courts consistently refused to adopt the principles for which these employers contended. And, ultimately, in a series of three decisions,

Tennessee Coal & Iron Co. v. Muscoda Local 123, 321 U. S. 590;
Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers of America, 325 U. S. 161; and
Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680,

the Supreme Court of the United States sustained the interpretation which had theretofore been given to the Act and held that all time worked should be compensable time. In doing so, the Court was, of course, exercising its normal judicial function of construing and enforcing the rights and liabilities of parties under existing law. And, as we have seen, its decision in such a case is "final, and binding upon all other departments of that government and upon the people themselves until they see fit to change their Constitution." (*Vide supra*, page 6.)

But the 80th Congress chose to declare that that decision was not to be "final and binding". It was dissatisfied with the result arrived at by the Court. It felt that this judicial interpretation of rights and liabilities created by the Fair

Labor Standards Act would be harmful and was improper. It put its criticism of that judicial interpretation in Section 1 of the Act, where it stated:

> "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long established customs, practices and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation."

Congress thus chose to declare that the liabilities enunciated by the Supreme Court should not be enforced. It was in order to avoid the normal and proper effect of the Court's determinations in pending cases that Congress avowedly adopted the Portal-to-Portal Act.

As the Court pointed out in *Kilbourn v. Thompson, Supra,* the judicial and legislative functions cannot be identical if the doctrine of the separation of powers is to have any meaning. If the Court was exercising a judicial function in determining whether or not employers were under an obligation to pay employees for the expenditure of their time and energy in such ways as the complaint in this case details, then obviously, the Legislature could not perform that function as well. Either the determination of these liabilities is judicial or it is legislative. If it is legislative then the Court never had the power to render its decisions in these cases at all. And if it is judicial then the Legislature has no authority to alter the determination of the Court.

But there is no doubt that the Court, in making its decisions in the cases referred to, was investigating, declaring and enforcing liabilities as they stood on present or past facts and under laws supposed already to exist. And it is equally clear that Congress has presumed to change those decisions, to nullify them, to interfere with the declaration

and enforcement by the Court of liabilities as they stand on present or past facts. The Congress did not, in passing the Portal-to-Portal Act, look entirely to the future in order to change conditions and make a new rule to be applied thereafter. On the contrary, it sought to change a rule already adopted and to change it for a period during which it had no competence whatsoever.

It is significant that the dissenting opinions in the *Tennessee Coal* and *Mt. Clements* cases announced precisely the doctrine adopted by Congress in its legislation. Those dissenting opinions argue that no work should be compensable under the Fair Labor Standards Act unless compensation can be justified under the terms of an express contract or by virtue of custom and practice in the industry involved. It is this view, rejected by the majority of the Court, which Congress has purported to make the governing rule by legislative fiat. By legislation it has transformed the Court's minority into the prevailing majority.

In the Portal-to-Portal Act, we are faced more clearly than at any time in American constitutional history with an effort on the part of Congress "to act as a court of review to which parties may appeal when dissatisfied with rulings of the court", to "subject the judgments of the Supreme Court to re-examination and revision" by Congress itself.

Congress indeed could have done no more if it had specifically sat as a court to review the determination of the Supreme Court than it has done by passage of this Act. No more could have been done by Congress if it had constituted itself as a judicial tribunal to hear an appeal from the decisions of what the Constitution declares to be the Supreme Court of the United States.

There is no doubt as to the Congressional desire for "changing the rules of decision for the determination of s

pending case." In the absence of the Portal-to-Portal Act of 1947, the rule of decision applicable to this pending case would be that enunciated by the Supreme Court in the *Tennessee Coal & Iron Co., Jewell Ridge* and *Mt. Clemens Pottery* cases. The primary purpose of the Portal-to-Portal Act was to change that rule of decision and to reach a contrary result. That Congress has no power to do this was clearly established in the case of *United States v. Klein*, 13 Wall. 128, 20 L. ed. 519.

Yet, so intent was Congress upon avoiding the effect of judicial determinations of liability under the Fair Labor Standards Act that it provided in the Portal-to-Portal Act (Sec. 9) for a complete relief from employer liability in all *pending* actions where an employer has "in good faith" relied upon "*any* administrative regulation, order, ruling, approval or interpretation of *any* agency of the United States, or any administrative practice or enforcement policy of *any* such agency with respect to the class of employers to which he belonged." And the relief from liability was made to apply even where "such administrative regulation, order, ruling, approval, interpretation, practice or enforcement policy is modified or rescinded, *or is determined by judicial authority to be invalid or of no legal effect.*" (Italics supplied.)

This, in effect, makes any governmental agency, regardless of the department to which it is responsible, regardless of whether it has acted within the scope of its authority, regardless of its knowledge of the facts, regardless of whether it has held any type of hearing at all, regardless of how arbitrary its decision may be, the final determinant of the rights of the particular employees involved. It deprives these employees of any recourse to the courts for the enforcement of their rights under the law just so long as some

governmental agent has made a ruiing adverse to them upon which their employer relies. It removes from the court its traditional function of considering and applying rights and obligations enunciated under the law. It purports to transfer that function effectively to the executive or legislative arms of the government or to any government agent who, willy-nilly, chooses to exercise it, and to leave parties free if they choose to disregard solemn judicial determinations. Upon what theory of due process of law such an enactment may be sustained is beyond the power of legal comprehension.

If the people of the United States desire to repose judicial power in Congress they may do so by adopting a constitutional amendment. Until the Constitution is amended, however, this Court has no alternative but to apply the Constitution as it stands today, to recognize and insist upon adherence to the principle of the separation of legislative and judicial power, and to declare this statute void.

II

THE PORTAL-TO-PORTAL ACT OF 1947 IS UNCONSTITUTIONAL IN THAT IT DEPRIVES THE PLAINTIFFS HEREIN OF THEIR PROPERTY AND VESTED RIGHTS WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT.

The Constitution of the United States contains an express provision prohibiting the enactment of that class of retroactive statutes known as *ex post facto* laws. (Article 1, Section 9.) While the Constitution is silent as to other types of retroactive legislation, such laws are not favored under our system of jurisprudence. Our courts, since early times, have held that "retroactive laws which impaired vested rights were contrary to justice, violations of the social compact or of the very principles upon which our Government was based, or were not properly an exercise of the legisla-

tive power at all. Such laws were held to be forbidden by, or in violation of, first principles, reason, justice, or the nature of our Government."

> *20 Minnesota Law Review*, 775, "The Rule Against Retroactive Legislation, A Basic Principle of Jurisprudence."

Leading cases which hold that a person cannot be divested of previously vested rights are: *Coombes v. Getz*, 285 U. S. 434, 76 L. ed. 866; *Ettor v. Tacoma*, 228 U. S. 148, 156, 57 L. ed. 773; *Pritchard v. Norton*, 106 U. S. 124, 132, 27 L. ed. 104; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450; *Ochiltree v. Railroad*, 21 Wall. 249, 252-253, 22 L. ed. 546; *Treigle v. Acme Homestead Association*, 297 U. S. 189, 80 L. ed. 575; *Lynch v. United States*, 292 U. S. 571, 583, 78 L. ed. 1434; *Duke Power Company v. South Carolina Tax Commission*, (C. C. A. 4), 81 F. (2d) 513; *National Surety Corporation v. Wunderlich*, (C. C. A. 8), 111 F. (2d) 622; *Badger v. Hoidale* (C. C. A. 8), 88 F. (2d) 208; *Harrison v. Remington Paper Company*, 140 F. 385, 390; *Knickerbocker Trust Company v. Myers*, 133 F. 764, 767; See also: *Forbes Pioneer Boat Line v. Everglades Drainage District*, 258 U. S. 338, 66 L. ed. 647; *Osbourne v. Nicholson*, 80 U. S. 654, 20 L. ed. 689. Some of these leading cases are discussed briefly, below:

The Ettor Case

The State of Washington by statute required municipalities to compensate property holders for damages resulting from street grading. While these actions were being heard this statute was repealed. The district court took the position that the right of action was statutory and fell with the statute. The Supreme Court reversed, holding:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the

fixed liability of the city to make compensation. *This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiff's in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation.*" (Italics supplied.)

The Hawthorne Case

A state statute provided that shares of stockholders should be liable for the debts of the corporation. A creditor sued a stockholder although the individual liability provision had been repealed two months after the debt was contracted. The Supreme Court reversed the State court and held that by virtue of the statute the stockholders "agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability"; and that the repealing act impaired the obligation of the contract.

The Joliffe Case

California provided by statute that when a pilot went out and offered his services to a vessel and the service was declined the pilot was entitled to one-half pilotage fees. Pending recovery on a suit for one-half pilotage fees, a new statute was passed repealing the terms of the old. It was claimed that recovery could not be had because the right was statutory and could be taken away. The Supreme Court disagreed with this defense, holding instead:

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under

which the transaction was had. *When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute.* And such is the position of the claim of the plaintiff below in the present action; the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed." (Italics supplied.)

Coombes v. Getz

This case involved the contract clause of the Federal Constitution. One section of the California Constitution provided that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. While creditors who contracted with the corporation were suing a director to enforce their rights, the section making the director liable was repealed. The court, in permitting the creditor to recover despite the repealing statute, reviews the entire problem of vested *versus* statutory rights. It said:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. *It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, Ettor v. Tacoma, supra; Pritchard v. Norton, supra),* to enforce his cause of ac-

tion upon the contract." *Ettor v. Tacomo, supra; Hawthorne v. Calef, supra; Steamship Co. v. Joliffe, supra; Ochiltree v. Railroad Co., supra; Harrison v. Remington Paper Co., supra; Knickerbocker Trust Co. v. Myers, supra.*

In applying the general rule to the facts in this case, the court in *Coombes v. Getz* held:

> "Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. *Harrison v. Remington Paper Co., supra,* p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts *(Ettor v. Tacoma,* and cases cited in connection therewith, *supra),* that, *upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, Section 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution."* (Italics supplied.)

National Surety Corp. v. Wunderlich

A statutory provision permitting creditors (for labor, supplies, etc.) of contractors to sue surety within 60 days of settlement was held on the authority of *Coombes* v. *Getz* to be part of the contract, so that a subsequent statute repealing this provision and substituting a one-year statute of limitations was not given retroactive effect where the 60-day period had elapsed prior to repeal and the suit was brought after repeal but within the new one-year provision. The Court conceded that the liability was contractual and not merely statutory.

Badger v. Hoidale

The Eighth Circuit Court of Appeals as in the *National Surety Corp.* case, following the authority of *Coombes* v. *Getz,* held that stockholders' liability to creditors remained after repeal of the constitutional provision upon which the claim was based. The result was reached on the basis of the court's opinion that because the liability antedated the repeal and was contractual it could not be impaired retroactively.

The Forbes Case

In this case a suit was brought for repayment of tolls to the extent that there was an overcharge collected for passage through a canal, in the face of a statutory prohibition against such collection. On the day of the decision in that suit the Legislature passed an act purporting to validate those tolls and to destroy the plaintiff's cause of action. Mr. Justice Holmes, for the Supreme Court of the United States, held that the legislative enactment was unconstitutional and the boat line could not be deprived of its right to recover the overcharge. In doing so he said:

> "Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation."

The Osbourne Case

In this case the Supreme Court refused to deprive a seller, in a contract for the sale of a slave, legal at the time of making, but outlawed subsequently not only by statute, *but by the Thirteenth Amendment to the Constitution,* of

his accrued right to the consideration. The Court strongly stated its uncompromising position in these terms:

> "*Rights acquired* by a deed, will or contract of marriage, or other *contract executed according to statutes subsequently repealed, subsist afterwards, as they were before, in all respects as if the statutes were still in force.* This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood tide of intolerable evils." (Italics supplied.)

So insistent was the Court upon adherence to this doctrine that it refused to interpret even the Thirteenth Amendment as having the effect of divesting the seller of his right to the purchase price in the absence of a specific provision to that effect in the amendment.

The Nature of the Obligation

The Supreme Court in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 583, 86 L. ed. 1682, for the first time, determined the nature of the employees' right under Section 16(b) of the Fair Labor Standards Act:

> "The liquidated damages for failure to pay the minimum wages under Sections 6(a) and 7(a) are *compensation, not a penalty or punishment* by the Government; *cf. Huntington* v. *Athill*, 146 U. S. 657, 668, 681; *Cox* v. *Lyles Bros.*, 237 N. Y. 367, 143 N. E. 226. The retention of a workman's pay may well result in damages too obscure and difficult of proof or estimate other than by liquidated damages (citing cases). Nor can it be said the exaction is violative of due process. It is not a threat of criminal proceedings, or prohibitive fines such as have been held beyond legislative power by the authorities cited by petitioner." (Italics supplied.)

In *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, the right under Section 16(b) again was carefully considered. The court affirmed the position taken in the *Missel* case quoted above. The court, in resisting the argument that claims arising under this section could be waived, held that the right was of a *"private-public character,"* and that the "sole right to bring such suit was *vested in the employee* under Section 16(b). Although this right to sue is compensatory, it is nevertheless an enforcement provision." (Italics supplied, p. 709). In holding that the rights of both the public and the individual were involved, the court concluded that neither the back wages nor the damages could be waived. The court stating: "They are collectible as private damages by the employee for failure to obey the same requirements as to wages which are punished and controlled, so far as the purely public interest is concerned, by criminal sanctions and injunction." (*Id.* p. 712).

One of the more recent cases interpreting Section 16(b), *Gangi* v. *Schulte*, 66 S. Ct. 925, repeated the earlier interpretation that "the damages are at the same time compensatory and an aid to enforcement." Again, it has been held that "the action for overtime under the statute is an action on *contract.*" *Republic Pictures Corp.* v. *Kappler*, (C. C. A. 8), 151 F. (2d) 543, aff'd 66 S. Ct. 958.

The Congressional debates indicate that sponsors of the Portal-to-Portal Act relied upon a theory that the rights of the employees which are here invaded are "purely statutory," that such rights can never be said to vest, and that, consequently, the principle governing the cases we have discussed is not applicable. It was upon this basis that they hoped for judicial approval of the drastic legislation they had produced.

But they have wholly misconceived both the nature of the rights of the employees here involved and the essence of the rule enunciated by the courts. It has never been held that a right or an obligation was removed from the protection of the Constitution merely by virtue of the fact that such obligation or such right would not have existed except for a particular statutory provision. Such a notion would repudiate the very basis for the doctrine of vested rights as enunciated by Justice Marshall—the maintenance of the supremacy of the law. For there is no principle which places non-statutory law or private contracts on any higher plane than legislative enactment.

What may be true of an inchoate cause of action has clearly no validity where, as here, the plaintiffs have fully performed their part of the contract. The legal consequences which flow from such performance may be rights created by a statute and its judicial interpretation. But once performance is complete, are such rights to be regarded as not vested, because they arise from solemn legislative enactments and judicial decisions, rather than private agreement? If that be the lower court's reasoning, it was clearly opposed to the well established precedents cited above.

It is respectfully submitted on behalf of the petitioners, that what the courts have always considered of importance in these cases, is whether the conditions precedent to the enforcement of the statutory right had been met, *whether anything had been done* by the claimants to perfect their right, whether consideration had been given or detriment suffered as prescribed by the law. If those conditions were present, *then the right vested, whether statutory or not.* And the fact is that in almost all of the cases denying to a legislative body the power to nullify vested

rights, the right was founded squarely upon the existence of a statute.

There is utterly no distinction in principle between the cases cited in the preceding paragraph of this brief and the situation with which the Court is here presented. Of course, no obligation would have existed here if the Fair Labor Standards Act of 1938 had never been adopted. But in the cases we have considered there would likewise have been no obligations if the statutes there involved had never been passed. As we have said, what the courts considered of importance was not the fact that the statute laid the basis for the right but rather that all steps necessary to perfect what was admittedly a statutory right had been performed by the plaintiffs in each case. In the *Ettor* case they had suffered the damage described in the statute. In the *Joliffe* case plaintiff had offered his services and had thus performed the act entitling him to the recovery. In the *Coombes* case the plaintiff had complied with the condition necessary to establish the defendant's liability in that he had extended credit to a corporation of which defendant was a director. In *Choate* v. *Trapp*, 224 U. S. 665, the plaintiffs had surrendered their right to the communal lands. And in each of the remaining cases the plaintiffs had similarly done everything required under the statute to perfect their statutory claims.

As has been pointed out, in the present case the plaintiffs involved have likewise performed all of the acts necessary to establish their right to recovery under the Fair Labor Standards Act. They have contributed their time and their energy to their employer for his gain. They have engaged in activities which the Supreme Court has held entitles them to the statutory rate of compensation. Thus they have *earned* the right to that compensation. Just as in *Ettor* v. *Tacoma, (Supra)*, when the "amending" statute

was here passed, "nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage."

In this connection it should be noted that in the *Brooklyn Savings Bank* case the Supreme Court characterizes the right to sue under Sec. 16(b) as *a vested right*. This would clearly seem, in the absence of authority to the contrary, to place the Portal-to-Portal Act in the unconstitutional category.

III.

THE PROVISIONS OF THE PORTAL-TO-PORTAL ACT OF 1947 PURPORTING TO AFFECT THE JURISDICTION OF THE COURTS CANNOT SERVE TO VALIDATE THE DEPRIVATION OF PLAINTIFF'S RIGHTS UNDER THE FIFTH AMENDMENT.

Congress apparently recognized the inherent infirmity of any legislation so blatantly calculated to vacate rights such as those enjoyed by plaintiffs herein. It did not stop with a declaration that employers should be relieved of liability in pending cases of the character here presented. In addition, the Portal-to-Portal Act provides that no court should have "jurisdiction" to enforce those claims which Congress desired to outlaw.

Thus, the Legislature attempted to circumvent the limit on its authority by invoking its power to control the jurisdiction of the courts. Presumably since it has been held that the power of Congress to control the jurisdiction of Federal courts is "plenary", that when Federal jurisdiction is withdrawn, "all cases, though cognizable when commenced, must fall" (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 226); since it has been held that Congress may deprive State courts of jurisdiction over certain Federal questions (*Bowles* v. *Millingham*, 321 U. S. 503, 88 L. ed. 892), it was thought that constitutional limitations

otherwise applicable could be avoided. If this were not the Congressional design, there would have been no purpose, no meaning, in seeking to deprive the courts of "jurisdiction" to enforce a liability which had apparently already been eliminated.

But Congress cannot so easily escape the Constitution. "Jurisdiction" is not a tag to be attached to anything at all. It has a meaning acquired through long years of judicial interpretation. What Congress has here called "jurisdiction" is patently something quite different. And Congress cannot turn one concept into its opposite by legislative *fiat.*

It has long been established that "jurisdiction" means the power to hear and determine, to make any decision at all. *United States v. Arredendo,* 6 Pet. 691, 8 L. ed. 547; *Grignon's Lessee* v. *Astor,* 2 How. 319, 11 L. ed. 283; *United States* v. *O'Grady's Executors, (Supra); State of Rhode Island* v. *Commonwealth of Massachusetts,* 12 Pet. 657, 9 L. ed. 1233. And that power—the power even to proceed to consider an issue—is to be sharply distinguished from the power to afford relief upon the showing of a particular set of facts. The latter involves a determination on the merits, and the power to make such a determination in itself *imports* the existence of jurisdiction. The attempt to identify the one wtih the other simply confounds the meaning of both. As the Court said, in *Ex parte Watkins,* 7 Pet. 568, 8 L. ed. 786, 788:

> "But the jurisdiction of the Court can never depend upon its decision upon the merits of the case brought before it but upon its right to hear and decide it at all."

And again, in *General Investment Company* v. *New York Central Railroad Company,* 271 U. S. 228, 70 L. ed. 920:

> "By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision

> thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * * as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain either because it will not injure or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. * * *."

Congress may not obliterate the distinction between jurisdiction and the merits of a case simply by the use of a phrase. Where, in truth, it is seeking to establish a rule of decision, its employment of a "jurisdictional" reference will be given no effect by the courts. It is well to recall again at this point the language of the court in *United States* v. *Klein*, 13 Wall. 128, 20 L. ed. 519, 525:

> "It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> "It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power."

There is no doubt as to the Congressional purpose in the Portal-to-Portal Act of 1947. For here, what Congress purported, in Section 2c of the Act, to establish as a jurisdictional test was, at the very same time and in specific terms, made also a rule for the determination of liability

(Sec. 2a). But such a confusion in purpose is legally impossible. Either the rule established by Congress is a rule of liability, a rule of decision, or else it is a jurisdictional requirement. It cannot be both.

In fact, of course, there is no doubt that it is the former. In the first place, as we have seen, Congress was intent, in passing this act, upon avoiding the effect of certain decisions of the Supreme Court. But these decisions did not establish a rule of jurisdiction. They declared a rule of liability. And what has been declared a rule of liability cannot suddenly be changed into the foundation for the exercise of any judicial power at all. Secondly, if the issue of an employer's liability under the Act were in fact jurisdictional, a determination thereunder would be subject to collateral attack, e. g. *Elliott* v. *Peirsol's Lessee*, 1 Pet. 328, 7 L. ed. 164; *Johnson* v. *Manhattan Railway Co.*, 289 U. S. 479, 77 L. ed. 1331. It is scarcely conceivable that Congress intended to place a judgment under the Portal-to-Portal Act in that category.

Thirdly, if this were a real limitation of jurisdiction over particular subject matter, it would have simply controlled the forum (e. g., Federal or State court) or the remedy (e. g., injunction or action at law) or the conditions under which relief could be granted (e. g., exhaustion of certain remedies). But where the definition of jurisdiction is an agency for eliminating *all* liability, it becomes no more than a subterfuge for the exercise of forbidden power. This, indeed, is one of the primary reasons why the *Kline* and *Millingham* cases (*Supra*, at page 28) lend no support to the constitutional validity of the Congressional action here attempted. For the former established the Congressional power over the jurisdiction of Federal courts. The Court was not at all considering the problem of removing all

jurisdiction for the enforcement of a liability or of using the removal of Federal jurisdiction for the precise purpose of destroying all capacity to realize a vested right. Similarly, in the latter case, the Court, in upholding the authority of Congress to deprive State courts of jurisdiction over certain Federal questions and to confine such jurisdiction to the Federal courts alone, was not presented with the problem of the complete denial of remedy. It was presented only with the problem of the Congressional authority to designate the tribunal and the procedure through which a remedy might be enforced.

As we have seen, the courts have declared that there is no vested right to a particular form of remedy. But they have, with equal consistency, declared that "a vested right of action is property in the same sense in which tangible things are property". *Pritchard* v. *Norton, (Supra);* see also *Gibbes* v. *Zimmerman, (Supra);* 2 Cooley, Constitutional Limitations, 756, and cases there cited. This distinction between the cause of action itself and the technique through which the action is prosecuted is basic to the Congressional power as interpreted by the highest court.

Concurrently with the enactment of Portal-to-Portal legislation, extravagant claims were made both in and out of Congress, as to the calamitous consequences which would follow upon enforcement of the wage claims involved. Most of these assertions, of course, clearly belong into the realm of propaganda (*Vide infra,* p. 38). But even if credit were to be given to these recurrent "emergency" justifications, there are clearly understood constitutional limitations upon governmental powers even in matters of great national concern. "The existence of an emergency may

justify the exercise of power. But such an emergency can never create a power which theretofore did not exist."

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398;
Wilson v. *New*, 243 U. S. 332, 248, 61 L. ed. 755, 773;
Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555, 79 L. ed. 1593;
Terry v. *Anderson*, 95 U. S. 628, 24 L. ed. 365;
Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281.

Indeed, even where a national calamity requires that certain steps be taken to change the nature of the remedy for vested rights, the existence of the right cannot be denied, and all remedy for its enforcement cannot be removed. In *Terry* v. *Anderson*, (*Supra*), the court declared:

> "The business interests of the entire people of the State had been overwhelmed by a calamity, common to all. Society demanded that extraordinary effort be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose *the obligations of old contracts could not be impaired*, but their prompt enforcement could be insisted upon or an abandonment claimed." (Italics supplied.)

Moreover, the Court significantly indicated that where the remedy formed a part of the obligation under the terms of a statute, it is even doubtful whether that remedy could be altered at all.

> "A liability by statute is as much the subject of remedial legislation as a liability by contract, unless the remedy enters into and forms part of the obligation which the statute creates." (*Ibid.*)

See also:

Lynch v. *United States* (*Supra*);
Worthen v. *Thomas*, 292 U. S. 426;
Home Building and Loan Association v. *Blaisdell*, (*Supra*);
Bronson v. *Kinzie*, 42 U. S. 311; and
Edward v. *Kearzer*, 96 U. S. 595;

as authorities in support of the general proposition that complete destruction of the remedy, as is here sought to be accomplished by the withdrawal of jurisdiction, is an unconstitutional impairment of the obligation of contract, contrary to the Fifth Amendment.

That which is forbidden to Congress because it invades the constitutional rights of the American people does not suddenly become permissible because it is enclosed in a wrapper labelled "jurisdictional control." The Supreme Court has said that:

> "* * * *Under the mere guise of realizing something within its powers, Congress may not lay a charge upon what is beyond them.* Taxes are very real things, and statutes imposing them are estimated by practical results". *Nichols* v. *Coolidge*, 247 U. S. 531, 71 L. ed. 1124. (Italics supplied.)

Jurisdiction, too, is a very real thing, and statutes affecting it are "estimated by practical results". We have already seen that in *United States* v. *Klein*, (*Supra*), the court refused to sanction an effort on the part of Congress to exceed the bounds of its authority simply because it termed its action a measure to control the jurisdiction of courts. The court looked to the reality behind the words. This Court should do no less.

All of the "great substantive powers of Congress" are "subject to the Fifth Amendment". So the Court said, in *Louisville Joint Stock Land Bank* v. *Radford*, (*Supra*),

citing the innumerable authorities establishing the proposition that the Fifth Amendment limits the exercise of even the war power, the power to tax, the power to regulate commerce and the power to exclude aliens. The power over the jurisdiction of the courts is no exception.

A recent District Court decision, *Boehle* v. *Electro-Metallurgical Co.* (D. C. Ore. 1947), 72 F. Supp. 21, upheld the constitutionality of the Portal-to-Portal Act on the theory that the decisions which sustained Congress' power to withdraw jurisdiction from Federal courts to issue injunctions in labor disputes precluded further consideration of the problem involved here.

The reasoning of this case is criticized as faulty in a comment in 47 *Columbia Law Review* 1025, where it is pointed out that in upholding that aspect of the Norris-LaGuardia Act, the Courts emphasized that (1) other remedies were still available in the Federal courts and (2) even the injunctive remedy might still be obtained in State tribunals, (see cases cited in note). The article concludes that "if an analysis of all the cases concerning withdrawal of jurisdiction reveals anything at all, it is that a novel experiment has been attempted in the Portal-to-Portal Act, and what few precedents can be amassed are unfavorably disposed to its validity." *(Loc. cit.)* In discussing the constitutionality of the Act, the article notes that it *"is probably the most outright instance in which potential property has been taken from one specific class, employees, and has been given to another, their employers."* (Italics supplied.)

There is of course nothing which may prevent a majority of the Congress from making a political present to employers, of wages rightly due their workmen. But the courts, as guardians of constitutional government, are bound by

a sacred trust to defeat any attempt of enforcement, by default of judicial process, of such rank class legislation. *A fortiori*, the courts must not allow themselves, by giving active aid to the execution of such measures, to become the altars upon which one of our most vital constitutional guarnatees is sacrificed to the moloch of political expedience. True, it is proclaimed that dire economic consequences would have followed the enforcement of portal-to-portal rights. Some such rationalization, however, can always be put forward readily, to cloak the despoliation, by naked political power, of one economic class by another. It is just this kind of legislation which the constitutional mandate is designed to guard against. Courts would fail their duty to the people if they were to permit themselves thus to be swayed by the expediencies of the hour.

THE DECISION IN THE SEESE CASE

The precise point here at issue was raised in the case of *Seese* v. *Bethlehem Steel Co.*, decided May 5, 1948. Counsel for petitioners in the present case appeared as *Amici curiae* at that time and presented arguments along the lines of this brief. The United States Court of Appeals, in affirming a decision of the District Court dismissing the complaint and upholding the constitutionality of the Portal-to-Portal Act of 1947 (74 F. Supp. 412), held in substance as follows:

1. Congress in enacting the Portal-to-Portal Act of 1947 was exercising legislative and not judicial power. The enactment merely repealed the original statute as interpreted by the Supreme Court and did not in any manner affect adjudications already made, or attempt to direct the courts in the exercise of judicial powers. All it did was to define rights, i.e. to amend or limit the effect of a prior statute so as to take away a cause of action given by it.

2. In enacting this law, Congress did not violate the Fifth Amendment to the Constitution, but was merely engaged in a reasonable exercise of its commerce powers by validating, retroactively, contracts invalid under the Fair Labor Standards Act. The exercise of this power was reasonable in view of a serious economic crisis found by Congress to be threatened as a consequence of portal-to-portal suits.

3. Since the substantive provisions of the Portal-to-Portal Act are valid there can be no question as to the validity of the section denying jurisdiction to the courts to entertain the claim. "Whether the denial of jurisdiction would be valid if the provisions striking down the claim were invalid is a question which does not arise."

For the reasons heretofore stated and upon the additional grounds set forth below, petitioners most respectfully beg to differ from the conclusions reached by the learned judges in the case just cited. In support of their contentions, petitioners respectfully submit the following:

1. While it is undoubtedly correct to state that a purely statutory, *inchoate* right may be lost by subsequent repeal of the basic statute and such repeal would clearly constitute legislative action, a different situation arises where the repeal seeks to destroy, retroactively, contractual rights already accrued under the terms of the statute as interpreted by the courts, and, in effect, seeks to reverse interpretative judicial decisions affecting the status and tenor of contracts fully performed. Nor can this result be accomplished indirectly by the withholding of appellate jurisdiction.

See: *United States* v. *Klein*, (*Supra*) and other cases before cited.

The Court in the *Seese* case fully recognized that the limitations of the Fifth Amendment apply to the exercise of the "commerce power" by Congress. It stated, however, that "the inquiry is not whether vested rights or rights under existing contracts have been interfered with, but whether or not the power has been exercised arbitrarily or unreasonably under the circumstances." It then continues to say that in view of the serious economic consequences envisioned by Congress and because of the threat to the very interstate commerce sought to be regulated, in the first place, by the Fair Employment Standards Act, the Congress had a right to repeal that Act and to substitute for it another measure containing an interpretation different from that given to the original statute by the courts. This was said to be merely taking away that which had no existence save by virtue of the original Act, *i.e.* a gift of the legislature, as it were. The preceding argument has attempted to point out the vital distinction between the cases cited in support of the last contention and the case at bar, to wit, that in the present case the contractual relation between the parties has become superimposed upon the bare framework of the statute and, by completed performance, the appellants have acquired a vested right which Congress has no power to destroy, retroactively, even in the face of national crisis *(vide supra)*.

Beyond this, however, petitioners submit that some courts, in the recent past, have too willingly and unquestionably accepted the self-serving statements contained in the enactment under scrutiny, to the effect that serious economic results, an "economic crisis", or some such dire threats to the national welfare existed as a consequence of suits filed under the Fair Labor Standards Act, as in-

terprete by the United States Supreme Court. Appellants earnestly submit that *the alleged emergency does not actually exist.* On the contrary, the real economic impact of portal-to-portal payments on the country's employers would be limited in point of application, relatively small in scale, and spread over a considerable period of time. The claims that portal-to-portal payments would have dire consequences to many individual employers are exaggerated and cannot be substantiated. In the instances of many large corporations sued by many thousands of workers the debts could be paid without difficulty, as has been shown in the case of a number of employers in major industries who have actually made comparable portal-to-portal payments without adverse effect. Moreover, the argument that serious losses to the Federal treasury would result is certainly fallacious, since Congress clearly has power to counteract such losses—on account of tax refunds resulting from portal-to-portal payments—by appropriate adjustments of the revenue acts.

On the other hand, appellants submit that the general effect of portal-to-portal payments on the economy of the country would be beneficial, a fact of far more significance for the general welfare than the hypothetical embarrassment which a handful of employers might suffer as a result of their individual liability. Industrial efficiency would be improved, purchasing power of the consumers, now on a serious decline, would be reinforced and other beneficial social effects would follow. In the event that the writ of *certiorari* should be granted by this Honorable Court petitioners desire to present detailed economic evidence to support their claim that there was, and is, no basis in the alleged economic emergency, and in the supposed need to override individual property rights in order to neutralize economic effects of portal-to-portal suits. It follows, that

the power to protect interstate commerce did not and does not justify the Portal-to-Portal Act of 1947 and that, therefore, the Court's assumptions in favor of constitutional validity of the Act deserve careful reexamination.

In conclusion, it might be noted that the cases cited in the opinion of the United States Court of Appeals in the *Sesse* case referring to the validity of retroactive curative acts or of "windfall" taxes may well be distinguished from the case at bar. It is respectfully submitted, that in the present case the issue is not one of subsequent ratification of contracts invalid when made. On the contrary, the presumption must be that the contracts were valid and legal when entered into and that their interpretation is determined by the terms of the statute then in force, as construed by the courts. There seems to be no ground for the assumption that the parties deliberately entered into an invalid contract which needed to be cured by subsequent legislation. The contracts in question were made in contemplation of the Fair Labor Standards Act. This statute, as interpreted by the United States Supreme Court, became part of the contract and when that contract was fully performed by the employees, by their rendering the labor and services which they were required to furnish under the conditions of their employment, their claim to consideration became a vested property right which could not be destroyed retroactively. The cases of *Steamship Co.* v. *Joliffe, (Supra), Ettor* v. *City of Tacoma, (Supra), Coombes* v. *Getz, (Supra),* and *Duke Power Co.* v. *South Carolina Tax Commission, (Supra),* are therefore clearly in point. The contractual obligation in most of these cases was likewise based, in the final analysis, on purely statutory rights. And it is open to serious question whether a right to compensation for actual work and labor performed is really nothing but a statutory gratuity, conferred by a benevolent

legislature, which can take it away at will, merely because the *measure* of compensation to be given is controlled, at the time of performance, by legislative enactment.

Similar reasoning applies to the distinction between this case and those involving windfall taxes. The sovereign power of the government to levy taxes is not based on contract and has been clearly distinguished, in innumerable cases, from other forms of taking of property which, lacking the express constitutional sanction of taxation, must fall as unconstitutional violations of due process, unless supported by the legal reasoning behind the several classes of cases involving retroactive legislation discussed fully above *(vide supra)*.

CONCLUSION

For the reasons and upon the authorities hereinabove set forth, it is respectfully urged that the judgment of the lower court was erroneous and should be reviewed by this Honorable Court, in view of the importance of the Federal issues involved, and to this end the Writ of *Certiorari* should issue to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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